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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1091

AVERN TRUST, VIRGINIA P. DOOLEY, JAMES A. DOOLEY and JAMES A. DOOLEY FOUNDATION,
a charitable corporation,

Petitioners,

vs.

JOHN W. CLARKE and JOHN W. CLARKE CO.,
a corporation,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit to review the judgment of that Court entered on July 14, 1969, which affirmed a judgment of the District Court for the Northern District of Illinois entered upon the verdict of a jury finding the issues for the respondents.

OPINION BELOW.

No opinion was rendered by the United States District Court. The opinion of the Court of Appeals for the

Seventh Circuit affirming the District Court's judgment is reported as an Appendix to 415 F. 2d Advance Sheet No. 4.

JURISDICTION.

The order of the Court of Appeals for the Seventh Circuit sought to be reviewed was entered on July 14, 1969. Petitioners filed a timely petition for rehearing, which was denied on October 21, 1969.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED.

1. Can the same Circuit Court of Appeals in one case hold that rules for the protection of investors state a separate and independent cause of action from counts predicated on the Securities Acts and the rules promulgated thereunder, and in this case hold that the dismissal of a count alleging the violation of similar rules, while improper, is not erroneous?

2. Are investors' actions under the Securities Acts and the rules thereunder to be tried as common law fraud actions, so that proof of deliberate intent is required, profits on other transactions admitted, together with evidence of what the stock would have been worth had it not been sold?

3. In investors' actions against an underwriter under the Securities Acts and the rules thereunder, can a Court frustrate the Congressional policy of full disclosure and fail to recognize the fiduciary relationship as a matter

of law? This decision is in direct conflict with a recent case of the Second Circuit.

4. Can Rule 51 of the Federal Rules of Civil Procedure be employed by a Court of Appeals to avoid passing on objections concerning an admittedly erroneous instruction, when the same objections were timely urged in the District Court in writing and regarded as such by the District Judge?

STATEMENT OF THE CASE.

The Court of Appeals in its opinion provided no statement of facts, but merely cited the allegations of plaintiffs' complaint.

The opinion of the Court of Appeals does not set forth the facts. Hence a statement will be necessary. In the interests of simplicity, we shall first set forth the facts about which there was no contradiction.

The respondent John W. Clarke & Company was registered with the National Association of Security Dealers and with the Securities and Exchange Commission. (A. 270) Neither Clarke nor his company had ever been members of any stock exchange. (A. 422) In the City of Chicago, where the respondents operated, there are only six brokerage houses without seats on any Stock Exchange. (A. 842, 843)

Members of a stock exchange receive a prescribed commission of about ¾ of 1% on stock transactions. (A. 297-299) Stock exchange members are prohibited from splitting commissions with non-members. (A. 298) The employees of the Clarke Company were himself and his wife. (A. 270)

Petitioner James A. Dooley acted on behalf of himself and the other petitioners. He is a Chicago lawyer. He is extremely active as a trial and appellate lawyer. He has contributed to his profession in lecturing at law schools, bar associations, authoring numerous law review articles, and revising Judge Cooley's work on torts. (A. 439-441)

The District Judge stated:

> "The Court: As far as his (petitioner Dooley's) activities are concerned, this Court is willing to take judicial notice of the fact that he has been on trial practically all of the working hours of the time. . . . I am willing to take judicial notice, because I have many times called him myself for trial and found him engaged regularly and consistently. There is no question about that counsel." (R. 1478, A. 740)

The respondent John W. Clarke knew that Dooley devoted virtually all of his time to the practice of law. He wrote to Dooley from time to time and made such statements as the following:

> "Knowing your busy schedule . . .
>
> "When you get your heavy burden of court off your shoulders. . . ." (P. Ex. 12)
>
> "I know you, like everyone else, must have fifty times more to read than you have the time in which to do it. . . .
>
> "If you can possibly find the time to read this. . . ." (Pl. Ex. 13)
>
> "I know you don't have time to think of your investments. . . ." (Pl. Ex. 14)

From 1938 or 1939 to 1960, Dooley had purchased securities from Baker, Walsh and Company. (A. 425) John F. Baker, a firm member, and Dooley had been law school

classmates. (A. 423, 425) At the end of 1960, Baker left the security business to return to the practice of law. (A. 423, 426)

Baker acted as Dooley's financial adviser from 1946 to 1960. (A. 443) Baker consulted with Dooley through those years. (A. 425, 431)

Baker, Walsh and Company never handled any underwritings (A. 423, 430) and never owned any inventoried stocks or bonds. (A. 423) The company was licensed as a stock broker-dealer and was a stock exchange member. (A. 423)

On July 21, 1958, respondent Clarke telephoned Dooley and invited him to lunch. (A. 308, 309, 444) Clarke had read an article in the Wall Street Journal of July 7, 1958, (A. 309, 311) concerning a case wherein Dooley had received a fee of $150,000. (Pl. Ex. 6) Clarke's purpose in having the luncheon was to sell securities to Dooley. (A. 311, 444, Pl. Ex. 7)

Dooley purchased $30,000 in bonds from respondents in 1958 (A. 983, Pl. Ex. 142, 434) and $35,000 in bonds in 1959. (A. 984, Pl. Ex. 145) These transactions were not the subject matter of petitioners' complaint.

The relationship out of which this action arose commenced in 1960, when Baker was returning to the practice of law. (A. 448) This is manifest by Resp. Ex. 36, a suggested program prepared by Clarke for Dooley dated September 14, 1960. (A. 966)

During this period, Clarke sold petitioners certain securities, and petitioners sustained substantial losses.

A chart tells the facts more succinctly than words:

Issue	*Date Acq'd*	*Respondents' Profit**	*Petitioners' Loss***
American Nat'l Ins.	11/13/61	$ 512.60	$ 1,287.40
Ariz. Pub. Serv. Co.	11/1/61	801.20	27,993.10
Ariz. Pub. Serv. Co.	9/18/62	1,000.00	21,619.78
Arlan's Dept. Stores	9/26/61	695.75	1,592.40
	5/10/62		
Business Cap. Corp.	2/8/61	3,700.00	21,261.48
Calandra Photo	8/9/61	235.00	510.15
Champion Spark Pl.	11/16/60	540.00	1,687.88
Cowles Mag. & Broad.	10/30/61	680.00	4,530.88
Ford Motor	6/17/61	1,040.00	652.35
	2/24/62	1,015.00	
Handschy Chemical	11/20/61	900.00	5,142.72
Rich. D. Irwin	8/29/61	234.00	1,406.86
Krylon Inc.	3/13/62	510.00	3,946.80
Marsh & McLennan	3/20/62	820.00	2,850.80
Metro-Goldwyn-Mayer	3/13/61	898.60	12,638.76
Morse Shoe Co.	4/5/62	568.00	5,566.20
North Am. Accept.	11/29/61	400.00	2,384.98
Pauley Petroleum	1/19/62	547.60	18,547.60
Pioneer Nat'l Gas		346.90	22.20
Tip Top Products	12/14/61	3,460.00	39,617.85
Western Nat. Gas	11/2/61	1,315.15	24,789.18
	2/15/62		
	3/16/62		
Total Respondents' Profit		$20,219.80	
Total Petitioners' Loss			$198,049.37

* As partially disclosed by respondents' answers to interrogatories (A. 45-6) and summarized in petitioners' Ex. 77, not received in evidence but offered as part of offer of proof (A. 1275-6) and in petitioners' Ex. 20, received in evidence. (A. 420)

** As partially disclosed by respondents' answers to interrogatories (A. 39-44) and summarized in petitioner's Ex. 82, received in evidence.

The percentage of Clarke's total allotment sold petitioners and his profit per share are very telling:

Issuer	*Percentage of Respondents' Shares Sold to Petitioners*	*Profit Per Share***
*Arizona Public Service Co.	100%	$ .50
Arlan's Dept. Stores (1)	11¼%	1.75
Arlan's Dept. Stores (2)	33¾%	1.75
Business Capital Corp.	50%	1.00
Calandra Photo Co.	33⅓%	.80
Champion Spark Plugs	40%	1.35
Cowles Mag. & Broadcast	20%	1.10
*Ford Motor Co. (1)	33⅓%	2.65
*Ford Motor Co. (2)	41⅔%	3.00
*General Motors Corp.	40%	1.00
Handschy Chemical	25%	1.02
Inland Life Ins.	50%	.24
*International Harvester Co.	100%	1.57
Richard D. Irwin	33⅓%	1.28
Kellwood Co.	40%	1.40
Krylon Inc.	40%	.85
Marsh & McLennon	25%	2.10
Morse Shoe Co.	32%	1.20
North American Acceptance	66⅔%	.40
Northern Illinois Gas	20%	1.00
Sel-Rex Corp.	25%	1.98
Tip Top Products	50%	4.90
"21" Brands, Inc.	16%	.80

* Listed on New York Stock Exchange but recommended and sold to petitioners by Clarke only when underwriting or secondary issue involved.

** Taken from Pl. Ex. 33, (R. 828-830) and Clarke's testimony (A. 374 et seq.).

On Clarke's advice, petitioners sold Business Capital Corporation and purchased California Growth. So also on his advice they sold Calandra Photo, Richard D. Irwin, Handschy Chemical, Tip-Top Products, Western Natural Gas, Pauley Petroleum, Cowles Magazine and Broadcasting, Krylon and Marsh and McLennan. (A. 410, 409, 411, 484, 412, 475, 479, 480, 481)

During this period, Clarke never advised petitioners to purchase New York Stock Exchange stocks, unless he was acting as an underwriter or a member of a selling group. (A. 410) So also was it uncontradicted that when Dooley would ask Clarke about a security listed on an exchange, Clarke would tell him it was a poorly managed company. (A. 449) Clarke himself said: "I might have told him that in an effort to persuade him not to purchase the security." (A. 351)

Dooley and his wife were guests for dinner in the home of Clarke and his wife during 1961 and 1962 (A. 315, 451-2); the Dooleys were entertained at the Saddle and Cycle Club by the Clarkes in 1961 (A. 316-452); the Clarkes were guests for dinner in the Dooleys' home (A. 316, 317, 452); Dooley and Clarke went on a retreat together in December, 1960, at Bellarmine Hall (A. 316, 451); Dooley was invited to lunch by Clarke on ten or twelve occasions (A. 314, 452); Clarke and his wife rendered some assistance to Dooley and his wife in connection with an adoption problem (A. 317-18), and Clarke obtained San Francisco hotel accommodations for Dooley in 1962 (Pl. Ex. 18), and throughout his correspondence referred to Dooley as "Dear Jim." (A. 317)

Clarke testified that he considered himself and Dooley to be "companionable friends." (A. 317)

Clarke telephoned many times. (A. 314, 318-9) When he could not reach Dooley, he left messages. (A. 318) Dooley's office kept a record of the times Clarke called but did not talk to Dooley. These showed 83 messages between July 1958 and February 1963. (Pl. Ex. 7; A. 699; A. 318-19) There were: 1 message in 1958; 5 messages in 1959; 12 messages in 1960; 27 messages in 1961; 35 messages in 1962, and 3 messages in 1963. (Pl. Ex. 7) Clarke stated that frequently when he called Dooley, Dooley was in court (A. 319-20), and that at times he called Dooley early in the morning before he went to court. (A. 320)

In conversation with Dooley's secretary, Clarke would refer to Dooley as "our favorite slave" or "Dirty face" —which he said were friendly salutations. (A. 319)

Clarke admitted that on three occasions he told Dooley he was buying for his wife the same securities he was recommending. He listed three separate securities: Champion Spark Plug (A. 335), Sel-Rex (A. 366-7) and Northern Illinois Gas Co. (A. 389) Dooley contended that Clarke's customary approach was that he had bought the identical security for his wife. (A. 470)

Marcella Niehoff, a widow, (A. 539) stated that Clarke often invited her to dinner at his home (A. 539, 572); that shortly after such dinners Clarke would telephone her and recommend she purchase certain securities (A. 539, 540), and that several times he said (A. 544): "This stock is good, because I just bought a block of it for my wife Maude." (A. 542)

During the acquisition of the above securities, Dooley did not know in what capacity the respondents were acting. (A. 457, 486) Dooley first learned of it in April 1963,

when another broker informed him that respondents had been selling to the petitioners as principals at an unusual profit. (A. 457, 492) Dooley would not have purchased the securities if he had known of the respondents' real interest in those securities, namely, if he was confining his recommendations to situations where he was an underwriter or member of a selling group, and thus making a substantial profit. (A. 491, 716)

Dooley did not know that the respondents were not members of any stock exchange. (A. 714-715)

Respondents failed to provide petitioners with final prospectuses with or before confirmations, although the confirmation reads: "copy of prospectus has been forwarded to customer." (A. 271, 272, 273 and see Pl. Ex. 1) It is sent with the confirmation, if it is available, (A. 273) and in many cases is sent out after the confirmation. (A. 273, 276) The sale becomes effective upon the confirmation (A. 272) so the customer does not see the final prospectus until after the sale has been completed. (A. 287) Petitioners were never advised by respondents that in most of the transactions, respondents were acting as underwriters, and in at least one, as a market-maker, except that the confirmations showed an "X" mark in a box purporting to show respondents acted as "principal" or "agent" in each transaction.

The only controverted facts turn around: (a) Dooley's testimony that generally Clarke advised him he was buying for his wife the same security he sought Dooley to purchase; and (b) what occurred at the September 1960 luncheon, the beginning of the relationship.

At the September, 1960, luncheon according to Dooley, he told Clarke that Baker was going out of the securities business, and that Dooley was, therefore, contemplating engaging the investment services of Stein, Roe and Farnham (A. 448), who are investment counselors rather than brokers or dealers. (A. 349) Dooley further told Clarke that he devoted all of his time to his profession and had no time to look after investments. (A. 450) Clarke told Dooley that he had been on LaSalle Street since he was a boy, was well acquainted with all phases of financial work and would give Dooley his personalized attention, (A. 449) and would be happy to look after Dooley's investments. (A. 450)

Clarke admitted he took Dooley to lunch on September 16, 1960, but denied that Dooley mentioned Baker or Stein, Roe and Farnham. (A. 348-9) However, Clarke admitted that as part of his business, he tells people what they ought to or ought not to buy, tells them the good points and bad points of securities and recommends securities when "I have in mind their particular needs, or I at least attempt to evaluate their needs in connection with the security." (A. 312)

The petitioners suffered the following losses on its transactions with the respondents (Pl. Ex. 82):

Virginia P. Dooley	$69,061.63
James A. Dooley	92,601.90
Avern Trust	29,280.50
James A. Dooley Foundation	7,105.34
Total losses	$198,049.37

REASONS FOR GRANTING THE WRIT.

1. This decision is in direct conflict with another decision of the same Court of Appeals on the same matter of Federal law.

The opinion in this case is directly contrary to *Buttrey* v. *Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 410 F. 2d 135 (7th Cir., 1969), decided by same Court of Appeals.

Petitioners urged error in the District Court's dismissal prior to trial (A. 153) of the second count of the amended complaint (A. 85-5), based on respondents' violations of certain Sections of Article III of the Rules of Fair Practice of the National Association of Securities Dealers (N.A.S.D.) promulgated under the Securities Exchange Act of 1934. These sections provide, inter alia, as follows:

> "Section 1. A member, in the conduct of his business, shall observe high standards of commercial honor and justice and equitable principles of trade."
>
> "Section 2. In recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs."

This Court of Appeals conceded that under *Buttrey* v. *Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, the district court in this case "improperly dismissed the claim for violation of section 2" because section 2 is intended "for the direct protection of investors."

The *Buttrey* case involved the "Know Your Customer Rule" or "The Rule of Due Diligence," of the New York

Stock Exchange, which was held to authorize an implied private right of action because it was intended to protect the public.

The Court of Appeals admitted that the N.A.S.D. rules are for the protection of the public as is Rule 405 of the New York Stock Exchange. It held that the district court improperly dismissed the claim for violation of section 2 of the N.A.S.D. Rules, but concluded "plaintiff was not prejudiced by dismissal because the same theory was incorporated under the claim for violation of section 15 of the Securities and Exchange Act * * *". (Opin. p. 7a) This conclusion is without basis. It is no more correct than affirming a dismissal of an action under the Federal Safety Appliance Act because the jury found for the defendant under the Federal Employers' Liability Act. The Court of Appeals (a) itself made an election of remedies causing petitioners to travel the more difficult road; (b) affirmed an admittedly erroneous dismissal of a court which could well be the basis of a favorable jury verdict.

The N.A.S.D. rules were adopted pursuant to Section 15A of the Securities Exchange Act of 1934, not pursuant to Section 15 (an entirely separate and different section of the act).

Plaintiffs' Count I, which was the only count tried by the jury, was based on Sections 12(2) and 17(a) of the Securities Act of 1933 and on Section 10(b) (and Rule 10 b-5 promulgated thereunder) of the Securities Exchange Act of 1934 (A. 81-2).

Section 15(c)(1) provides:

> "No broker or dealer shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce the

purchase or sale of, any security (other than commercial paper, bankers' acceptance, or commercial bills) otherwise than on a national securities exchange, by means of any manipulative, deceptive or other fraudulent device or contrivance. * * *"

Rule 15c 1-2, promulgated under Section 15(c)(1) reads as follows:

"(a) The term manipulative, deceptive or other fraudulent device or contrivance, as used in section 15(c)(1) of the Act, is hereby defined to include any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

"(b) The term manipulative, deceptive or other fraudulent device or contrivance, as used in section 15(c)(1) of the Act, is hereby defined to include any untrue statement of a material fact and any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, which statement or omission is made with knowledge or reasonable grounds to believe that it is untrue or misleading.

"(c) The scope of this rule shall not be limited by any specific definitions of the term manipulative, deceptive, or other fraudulent device or contrivance contained in other rules adopted pursuant to section 15(c)(1) of the Act."

Neither Section 15 (Section 15(c)(1)) nor the rule promulgated thereunder (Rule 15c 1-2), relied upon by the petitioners in Count I, bears any resemblance to the sections of the N.A.S.D. rules, which have definite specific prohibitions.

In *Buttrey,* this same Court of Appeals held each of the three counts stated a separate cause of action. Count

I was based on Rule 405 of the New York Stock Exchange; Count II "was based on the same factual allegations" and alleged a violation of Section 17 of the 1933 Act and Rule 10 b-5 under the 1934 Act; and Count III alleged violations also of Section 17 and Rule 10 b-5.

If the three counts in *Buttrey* stated separate causes of action, the two counts in this case stated separate causes of action and the Court of Appeals erroneously held that Count I incorporated "the same theory" as Count II. Petitioners were entitled to a jury determination on Count II.

2. This statutory action was tried as if it were a common law fraud case; in exacting proof of "intentional and deliberate" wrongdoing, and admitting evidence of other transactions on which the investor profited, this opinion conflicts with decisions of this Court and those of the Second and District of Columbia Circuits.

Today actions between investor and broker represent a substantial segment of civil litigation. There has been no decision of this Court articulating the guidelines for the trial of cases under this Act of Congress. Until this Court acts, problems arising under this federal statute, which must have a uniform interpretation, will be interpreted in the same patchwork fashion as actions under the Federal Employers' Liability Act were prior to this Court's intervention three decades ago.

Here the District Court and the Seventh Circuit Court of Appeals have exacted that plaintiff, in an action under this statute, prove intentional and deliberate wrongdoing by defendants, allowed evidence of investors' profits on other transactions not in violation of the Act, permitted evidence as to market fluctuations after the sale

by the investor, notwithstanding the statute itself fixes the damages (15 U.S.C. 77L).

Above all, there was a refusal to recognize the fiduciary relationship which existed between petitioners and respondents. At the instance of respondents, over petitioners' specific objections, the jury was instructed thus:

> "You are instructed that in order for you to return a verdict in favor of the plaintiffs on such charge, *you must be convinced that the plaintiffs have established by a preponderance of the evidence each and every one of the following propositions*: . . .
> "(2) *That* the defendants in connection with sales of securities to plaintiffs made false statements of material facts or omitted to state material facts necessary to be stated in order to make the statements made in the light of the circumstances under which they were made not misleading *and that* the acts, practices, and course of conduct engaged in by the defendants constituted a device, scheme or artifice to defraud *and that* the said acts, practices and course of conduct did operate as a fraud or deceit upon the purchasers, and
> "(3) *That said alleged false statements, omissions, acts, practices and course of conduct were intentional and deliberate.*" (Emphasis added.)

The Court of Appeals regarded intent necessary, saying: "The specific intentional and deliberate violations of the anti-fraud of the Act charged were that the defendants sold to the plaintiffs a substantial portion of each underwriting Clarke and Company participated in . . ." (Opinion p. 2a)

This Court pointed out in *S.E.C.* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963), in construing the Investment Advisers Act of 1940, and granting the Commission an injunction:

> "It would defeat the manifest purpose of the Investment Advisers Act of 1940 for us to hold, therefore, that Congress, in empowering the courts to enjoin any practice which operates 'as a fraud or deceit,' intended to require proof of intent to injure and actual injury to clients." (p. 192)

But this opinion does not seem to have resolved this issue in investors' actions under the Securities Acts. Thus in the recent case of *Globus, et al.* v. *Law Research Service, Inc., et al.,* Docket Nos. 32766-68, decided September 8, 1969, by the Court of Appeals for the Second Circuit, that Court noted that in actions under the Securities Act, the question of intent to defraud "has been the subject of much debate. See, e.g., *SEC* v. *VanHorn,* 371 F. 2d 181, 185 (7th Cir. 1966); *Ellis* v. *Carter,* 291 F. 2d 270 (9th Cir. 1961); *Royal Air Properties, Inc.* v. *Smith, supra; Fishman* v. *Raytheon Mfg. Co., supra; Weber* v. *C.M.P. Corp.,* 242 F. Supp. 321 (S.D. N.Y. 1965); Bromberg, Securities Law, §§ 2.6(1), 2.7(1); 6 Loss, *supra,* at 3552-53, 3883-88." It continued thus: "But the trend is clearly away from enforcing a scienter requirement equal to the 'intent to defraud' required for common law fraud. Before there may be a violation of the securities acts there need not be present all of the same elements essential to a common law fraud, see *SEC* v. *Great American Industries,* 407 F. 2d 453, 463, cert. denied, ... U.S. ..... (my concurring opinion)."

Petitioners tendered their Instruction No. 25:

> "In order for the plaintiffs to recover for a violation of the securities laws it is not necessary that they prove that the defendants had a fraudulent intent." (A. 1426)

Further demonstration of the common law concept of this statutory action was manifest in allowing respond-

ents to show profits by petitioners on transactions other than those in issue. (A. 589, 595, 617, 622, 649, 650, 659-60, 671) In such an action, the only issue is whether the defendant violated the Act on issues complained of. If the law were otherwise, it would permit the violating broker to tell the defrauded investor that on certain other transactions the investor had made a profit.

The Court of Appeals opinion of the Seventh Circuit is directly counter to that of the Second Circuit in the *Globus* case, (*Globus, et al.* v. *Law Research Service, Inc., et al.,* Docket Nos. 32766-68, U.S.C.A. 2d Cir.) where Judge Kaufman stated:

> "But, Judge Mansfield was correct in stating the issue to the extent of the loss the plaintiffs suffered as a result of their sale, not whether subsequent transactions in the stock led to a profit. Any other concept would prevent one from suing an issuer of stock even for the most flagrant violations."

To the same effect is the District of Columbia Court of Appeals in *Hughes* v. *S.E.C.,* 174 F. 2d 969, 974.

Another manifestation of improper use of common law concepts was the admission in evidence, over petitioners' objection, of respondents' Exhibits 169 to 175 inclusive. (A. 1123-1153, 1189) These were charts of transactions not in issue, profits realized, profits unrealized, and the stock market as of March 6, 1964, the date of the filing of the suit, notwithstanding that petitioners had admittedly sold the securities and sustained the loss. This fact fixed their damages under the statute. (15 U.S.C. 77 *l*)

If a broker-dealer, who defrauds an investor, can urge that the investor would have sustained no loss had he held the security in question, then the acts and the rules of the Commission are meaningless.

The frustration of the Congressional policy of full disclosure was complete when the Court of Appeals considered this case as one involving "a dealer and his customer." It is well established that an underwriter or a market-maker is a fiduciary as a matter of law.

In *Globus* v. *Law Research Service, Inc.*, ... F. 2d ..... (2nd Cir., 1969), the Court of Appeals said:

> "And Congress intended to impose a 'high standard of trusteeship' on underwriters."

The Court cited Kroll, "Some Reflections on Indemnification Provisions and S.E.C. Liability Insurance in the Light of Barchris and Globus," 24 Business Lawyer 681 (1969) at page 687, where the following appears:

> "We all know that Congress intended that Section 11 would impose on management and underwriters who sponsor and issue a high standard of trusteeship and a 'duty of competence as well as innocence.' [H.R. Rep. No. 85, 73rd Cong., 1st Sess. (1933) 3, 5, 9; S. Rep. No. 47, 73rd Cong., 1st Sess. 5 (1933)]. The section was intended to 'promote careful adherence to the statutory requirements.' "

See also: *Hughes* v. *Securities & Exchange Com.*, 174 F. 2d 969 (C.A. D.C.), which cannot be reconciled with this decision, and Cohen's analysis of the status of broker-dealer as a fiduciary, Duke University Law School, "Conference on Securities Regulation" (Commerce Clearing House, 1965) pp. 60-61.

It must be remembered that of the twenty transactions in issue, fourteen involved respondents as underwriters, and a fifteenth as a market-maker.

The Court of Appeals did not address itself to this question of law, but stated: "* * * here, the jury, by vir-

tue of its general verdict, necessarily found that such a relationship did not exist." (Op. p. 3a)

Of course, there is no proposition of law that a general verdict has any such significance, particularly when error has intervened.

3. The decision interprets Rule 51 of the Federal Rules of Civil Procedure so that it is impossible to have a court of review pass upon objections to instructions—a deleterious effect upon the future administration of this rule.

We have already set forth respondents' given Instruction 18, *ante,* p. 16, whereby, in order to recover, petitioners were required to prove: (a) all the elements of wrongdoing provided for by the Act and rules, although the Act and the rules are in the disjunctive "or" and (b) deliberate and intentional wrong.

The error described by the Court of Appeals was as follows:

> ". . . the elements of wrongdoing are connected by the word 'and' in the instructions given, whereas, the Act and Rules join them by the disjunctive word 'or'." (Op. p. 6a)

In the applicable statute and rules (Section 17(a) of the 1933 Act and Rule 10b-5 and Rule 15c 1-2), the first two "ands" in paragraph 2 of the instruction are "ors" and paragraph 3 of the instruction is not in the statute.

The Court of Appeals stated that "With reference to Instruction No. 18, plaintiffs' counsel merely stated that it was repetitious" and that this was an inadequate objection under Rule 51.

The record shows that petitioners objected in writing, and these objections to this instruction covered the exact grounds urged in the Court of Appeals.

The conference on instructions commenced on Friday, January 26, 1968 (A. 1286) and petitioners' objections to respondents' instruction No. 18 covered four pages of the record (A. 1303-1306), including a continuing objection by petitioners as to the magnitude of the burden of proof which No. 18 saddled upon petitioners.

The conference on instructions was adjourned to Monday, January 29 (A. 1325). When the conference on instructions was resumed on Monday, the following occurred (A. 1326-7):

> "Mr. Dooley: Your Honor, we prepared some written instructions—written objections—to the defendants' tendered instructions.
> "The Court: If we have written objections that will save us time. Leave is granted to plaintiffs to file its objections to the tendered instructions in written form, and *it will not be necessary to hear anything any further on that.*
> "Mr. Flynn: I don't even have a copy of it, your Honor.
> "The Court: That is what I am saying, *I will retire and study them.* You will take time to look at them and then I will hear you briefly on that and very briefly and rebuttal, because these are very extensive. So we will handle it in that manner." (Emphasis added.)

It is obvious that the written objections were part of the conference and were regarded as such by the District Court and counsel.

The written objections covered 15 pages and included eight specific objections to respondents' instruction No.

18 (A. 163-165), including the following objections (A. 164):

> *"Defendants' Tendered Instruction No. 18*
>
> "Plaintiffs object to this Instruction for the following reasons:
>
> * * * * *
>
> "D. *Refers to the Sections by Terminology which is improper since the jurors will not have the correct terminology of the Statute. We refer to Sections (a) (1) (2) and (3):*
>
> * * * * *
>
> "F. *Paragraph 2 of the said complaint [should be 'instruction'] requires the plaintiffs to prove certain facts in the conjunctive 'and that the acts, practices' etc., whereas under plaintiffs' complaint and in the law in this case there can be a recovery upon proof of any charge within the complaint* . . .
>
> "G. *There is no requirement under the Act as set forth in paragraph (3) of this Instruction to prove that the omissions, acts and courses of conduct 'were intentional and deliberate.' To hold that the plaintiffs had to do this is to place upon them an onus with the law which the law does not.*" (Emphasis added.) (A. 164, 165)

The objection was made as clearly and specifically as possible.

The written objections were made during, and in fact at the very beginning of, the Monday conference (A. 1326-27).

The district court stated in the record that prior to the charge he would take a recess to retire and study the written objections (A. 1326). The following occurred (A. 1346):

"The Court: Well now, counsel, you have given me a 15-page written, which I am going to file, and *your record is protected.*"

* * * * *

"The Court: All right, let the record show that this Court has given a hearing for the purposes of conforming to the rules in order that all instructions may be submitted and that all may be objected to by the respective parties *in order to preserve the record for possible appeal.*

"Mr. Barnett: (Counsel for Plaintiff) *And our written objections will stand.*"

"The Court: *I have notified the Clerk to file your written objections.*" (Emphasis added.)

As if that were not enough, petitioners tendered their instruction 25, concerning intent. (A. 1426)

There was nothing humanly possible that petitioners could have done further to make their objections and to state the grounds for the objections. The Court of Appeals stated:

". . . the trial judge gave the plaintiffs an opportunity to elaborate upon the written objections. With reference to instruction number 18, plaintiffs' counsel merely stated that it was 'repetitious'."

The district court did not "give an opportunity to elaborate." Petitioners' counsel simply volunteered as follows (A. 1359):

"Your Honor, may we note that there are 1, 5, 16, 25, 13, 17, 18 and 19 instructions tendered by the defendant which the Court has indicated he is going to give dealing with the preponderance of the evidence and the burden of proof. We object on the ground of repetition *along with the other objections we have already stated.*" (Emphasis added.)

Certainly Rule 51 was never intended for the purpose for which it was thus employed in these circumstances. If this be true, then there can be no preservation of objections to instructions.

For a Court of Appeals to say the objections were not made is hardly consistent with its responsibility. This alone should justify the granting of this writ under the supervisory powers of this Court, to insure the rights of other litigants.

PRAYER FOR WRIT OF CERTIORARI.

Wherefore, petitioners pray this Court's writ of certiorari to review and reverse the judgment of the Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

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Chicago, Illinois 60603
Attorney for Petitioners

In the United States Court of Appeals
For the Seventh Circuit

SEPTEMBER TERM, 1968 — APRIL SESSION, 1969

No. 16957

AVERN TRUST, VIRGINIA P. DOOLEY, JAMES A. DOOLEY and JAMES A. DOOLEY FOUNDATION, a corporation,

Plaintiffs-Appellants,

v.

JOHN W. CLARKE and JOHN W. CLARKE & Co., a corporation,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

JULY 14, 1969

Before KILEY, SWYGERT and KERNER, *Circuit Judges.*

SWYGERT, *Circuit Judge.* The plaintiffs in this action, James A. Dooley, his wife, Virginia, the Avern Trust, of which the Dooleys are the beneficiaries, and the James A. Dooley Foundation, a charitable corporation, seek damages for fraud and breach of a fiduciary relationship arising from a series of securities transactions during 1961-63 with the defendants, John W. Clarke & Co., a broker-dealer in securities, and John W. Clarke, its president.

The amended complaint charged the defendants with fraud by virtue of their alleged violation of sections

12(2) and 17(a)(1)(2) and (3) of the Securities Act of 1933, 15 U.S.C. §§771(2) and q(a)(1)(2) and (3), and certain antifraud provisions and rules promulgated thereunder of the Securities Exchange Act of 1934, section 10(b) and Rule 10b-5 and section 15(c)(1) and Rule 15c 1-2, 15 U.S.C. §78j(b), 17 CFR 240.10b-5, and 15 U.S.C. §78o(c)(1), 17 CFR 240.15c 1-2. The amended complaint further charged the defendants with a violation of section 15A(b)(7) of the Exchange Act, 15 U.S.C. §78o-3(b)(7), and sections 1, 2 and 18 of Article III of the Rules of Fair Practice of the National Association of Securities Dealers. Compensatory damages in the amount of $152,500 and punitive damages in the amount of $295,000 were demanded.

The specific intentional and deliberate violations of the antifraud provisions of the Acts charged were that the defendants sold to the plaintiffs a substantial portion of each underwriting Clarke & Co. participated in for the purpose of realizing an underwriting profit that was larger than the commission charged in connection with the purchase of listed securities and for the purpose of avoiding any possible liability on the underwriting commitment of Clarke & Co.; that the defendants did not advise the plaintiffs of the "risks inherent" in the securities purchased by the plaintiffs; that the defendants consistently took a position adverse to the plaintiffs in that Clarke & Co. secretly dealt as a principal with the plaintiffs; and that the defendant, Clarke, made the misrepresentation that he was purchasing large blocks of securities being offered to the plaintiffs for the account of his wife and that he held large blocks of such securities.

After extensive discovery, a jury trial was held and, after denial of the defendants' motions for a directed verdict made at the close of the plaintiffs' case and after all the evidence was in, the jury returned its verdict finding the issues for the defendants. Plaintiffs' motions for judgment notwithstanding the verdict and for a new trial were denied. This appeal followed.

Since the evidence in this case is voluminous, we will discuss it only as it relates to particular errors that have been raised in this appeal. Most of the errors here relate

to questions of fact that were within the province of the jury to determine. Thus, as a court of review, our inquiry is limited to deciding whether there was substantial evidence to support the jury's verdict.

The first contention presented is that the plaintiffs were entitled to a judgment notwithstanding the verdict. The standard to be applied in determining whether they were entitled to a judgment n.o.v. was recently stated by this court in *Funk* v. *Franklin Life Ins. Co.*, 392 F.2d 913, 915 (7th Cir. 1968); "The motion is properly denied where the evidence, along with all inferences to be reasonably drawn therefrom, when viewed in the light most favorable to the party opposing such motion, is such that reasonable men in a fair and impartial exercise of their judgment may reach different conclusions."

The plaintiffs suggest that as a matter of law a fiduciary relationship existed between plaintiffs and defendants. Support for this position is said to be found in the cases of *Charles Hughes & Co.* v. *S.E.C.*, 139 F.2d 434 (2d Cir. 1943), *cert denied*, 321 U.S. 786 (1944), *Hughes* v. *S.E.C.*, 174 F.2d 969 (D.C. Cir. 1949), and *Norris & Hirshberg, Inc.* v. *S.E.C.*, 177 F.2d 228 (D.C. Cir. 1949). These authorities are not controlling here since all present substantially dissimilar factual situations and in each the finder of fact concluded from the evidence that a relationship of trust and confidence existed between a dealer and his customer, whereas, here, the jury, by virtue of its general verdict necessarily found that such a relationship did not exist. Although there was much evidence that the defendant, Clarke, promoted a friendship with Dooley for the purpose of selling him securities, there was also evidence that Dooley acted in a manner inconsistent with his claimed financial naivete and fiduciary reliance. For example, Dooley maintained quite detailed ledger sheets covering all of his investments during the course of his dealings with the defendants. These ledger sheets reveal that Dooley had the time and interest to look after his investments and that he was aware of the nature of the securities being sold to him by Clarke, as well as Clarke's capacity. The dispute between the parties in April 1961 over the clipping by Clarke's secretary of certain mu-

nicipal bond coupons belonging to Dooley and Dooley's careful comparison pricing in September 1962 of some $1,000,000 of government bonds which he intended to purchase are further evidence of Dooley's lack of complete reliance on Clarke's financial advice and services.

A major contention of the plaintiffs is that they were defrauded by Clarke in that they did not know and Clarke did not disclose to them that he was an underwriter and, thus, when he was acting as a principal in dealing with them, Clarke was making a profit as a principal. Further, the plaintiffs assert that they did not know the difference between a principal and an agent in securities transactions until 1963. This was a question of credibility for the jury. Further, the confirmation of each sale made by the defendants to the plaintiffs stated whether the confirmed sale was made with the defendants acting in their capacity as principal or agent. The jury had reason to believe that the plaintiff, Dooley, especially in light of his legal experience and the volume of his previous securities transactions, knew the difference between principal and agent transactions and was fully cognizant of Clarke's role as underwriter.

For the first time in their reply brief, the plaintiffs urge that the defendants violated section 5(b) of the Securities Act of 1933 in that they did not always accompany or precede confirmations of sale with a final form of the prospectus. This violation of section 5(b) is said to constitute liability under section 12. At trial, the plaintiffs proceeded on the theory that the defendants failed to comply with the provisions of Rule 15c1-4, 17 CFR 240.15c1-4, promulgated under the Exchange Act of 1934. Since that rule requires only that a final prospectus be received by the customer before completion of the sale, there was no issue whether a final form prospectus preceded confirmation. The proof at trial as well as the tendered jury instructions related only to a theory of recovery under the Exchange Act Rule. Thus, the factual inquiry was whether with respect to each of the underwritings in question the plaintiffs received prior to the time payment was due a final form prospectus which disclosed that Clarke & Co. was an underwriter and the

total amount of underwriting profit. The jury instructions spoke only in terms of whether a prospectus was received prior to the time payment was due. Under the circumstances, the plaintiffs are precluded from arguing a new theory of recovery for the first time on appeal. *Cleary* v. *Indiana Beach, Inc.*, 275 F.2d 543 (7th Cir.), *cert. denied*, 364 U.S. 825 (1960); *Miller* v. *Avirom*, 384 F.2d 319 (D.C. Cir. 1967).

The plaintiffs claim that the business operations of Clarke & Co. were conducted in a manner similar to a "boiler-shop." There is no support in the record for this assertion. The securities sold by Clarke & Co. were not of the low-priced speculative variety normally associated with such operations. Additionally, there is no evidence of high-pressure selling methods or misrepresentations concerning the securities involved.

Despite the plaintiffs' contention, the evidence established that the plaintiffs authorized each transaction they had with the defendants. The plaintiffs rely on Dooley's testimony that the defendants purchased several issues on behalf of the plaintiffs without prior authorization. Clarke denied this testimony and stated that prior to selling each of the securities in question he discussed them with Dooley and obtained his approval to buy them. The jury believed Clarke. Dooley's testimony cannot be the basis for a judgment n.o.v.

The plaintiffs' final argument relating to its judgment n.o.v. contention is that certain "admissions" of John Clarke constituted a prima facie case of fraud and violation of a fiduciary relationship. We have considered these statements of defendant Clarke, most of which are innocuous or ambiguous, and do not view them in the light suggested by the plaintiffs.

The second major category of errors alleged by the plaintiffs pertains to the instructions given by the district court. The plaintiffs cite the giving or failure to give thirteen separate instructions as reversible error. We will only discuss the more substantial of the alleged errors, since we find no error in the instructions.

The plaintiffs specify as error defendants' instruction number 18, which sets forth what matters plaintiffs must

prove to show a violation by defendants of section 17(a)(1)(2) and (3) of the Securities Act and Rules 10b-5 and 15c1-2 promulgated under the Exchange Act. Plaintiffs complain that this instruction is erroneous in that the elements of wrongdoing are connected by the word "and" in the instruction given, whereas, the Act and Rules join them by the disjunctive word "or." It is our view that the plaintiffs waived their right to raise this error since at the conference on instructions and following the court's charge, they failed to make the objection that is now being relied upon. The plaintiffs' further contention that their written objections to the instructions contained the error now raised must fall. After leave was granted to file written objections just minutes before the jury was charged, the trial judge gave the plaintiffs an opportunity to elaborate upon the written objections. With reference to instruction number 18, plaintiffs' counsel merely stated that it was "repetitious." This was inadequate notice of the objection. Rule 51 of the Federal Rules of Civil Procedure precludes the assignment of error when no specific objection to an instruction is made. Likewise, the Supreme Court has expressly required that objections be specific. *Palmer* v. *Hoffman*, 318 U.S. 109, 119 (1943).

Three of the instructions complained of, numbers 2, 25 and 28, were the plaintiffs' own instructions. We do not find that any jury confusion could have resulted from the asserted inconsistency between the plaintiffs' tendered instructions and the defendants' instructions numbered 18, 20 and 30. Defendants' instructions numbers 8 and 7 were taken verbatim from Mathes and Devitt, *Federal Jury Practice and Instructions* (1965). These instructions were not erroneous.

Plaintiffs claim a variety of evidentiary errors were committed by the trial judge. These errors are said to arise from the allowance into evidence of certain testimony adduced by the defendants and the exclusion from evidence of certain matters that the plaintiffs sought to introduce. It would serve no useful purpose to canvass these claims of prejudicial error. We have considered the claims and find them to be without merit.

(Opinion of the United States Court of Appeals)

Error is asserted to have resulted from the district court's striking the plaintiffs' claim for punitive damages. It is difficult to see how the plaintiffs can complain about this. Not only was their proof insufficient to persuade the jury to award compensatory damages, but also the evidence in the case was completely devoid of any hint of the wantonness, malice or impropriety that must underline a claim for punitive damages. Further, it has been held that punitive damages cannot be recovered in a private action brought under the Exchange Act and the Rules thereunder. *Estate Counseling Service, Inc.* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 303 F.2d 527 (10th Cir. 1952). In addition, section 12(2) of the Securities Act expressly provides that the measure of damages is recovery of "the consideration paid for such security with interest thereon."

Plaintiff alleges as error the dismissal by the district judge of the claim based on violations of section 1, 2 and 18 of Article III of the Rules of Fair Practice of the National Association of Securities Dealers. In *Buttrey* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 17136 (7th Cir., filed April 17, 1969), this court held that there was a private right of action for violation of Rule 405 of the New York Stock Exchange in order to protect the public. The Rules of the N.A.S.D. were enacted under section 15A of the Securities and Exchange Act. 5 U.S.C. §78o-3. Section 2 of Article III of the Rules of Fair Practice is intended "for the direct protection of investors." Lowenfels, Implied Liabilities Based Upon Stock Exchange Rules, 66 Colum. L. Rev. 12, 29 (1966). Therefore, the district judge improperly dismissed the claim for violation of section 2. However, plaintiff was not prejudiced by dismissal because the same theory was incorporated under the claim for violation of section 15 of the Securities and Exchange Act. 15 U.S.C. §78o.

We have considered the other errors raised by the plaintiffs and find them to be without substance. This lawsuit grew out of a complicated factual background. The issues of fraud and breach of a fiduciary relationship in the last analysis presented questions of credibility and fact. The jury was in the best position to make a determination of these facts. We are unwilling to overturn

the result of a trial that lasted almost three weeks and where substantial evidence supports the jury's verdict.

The judgment of the district court is affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 1091

AVERN TRUST, VIRGINIA P. DOOLEY, JAMES A. DOOLEY AND JAMES A. DOOLEY FOUNDATION, A CORPORATION,

Petitioners,

vs.

JOHN W. CLARKE AND JOHN W. CLARKE & CO., A CORPORATION,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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AVERN TRUST, VIRGINIA P. DOOLEY, JAMES A. DOOLEY AND JAMES A. DOOLEY FOUNDATION, A CORPORATION,

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JOHN W. CLARKE AND JOHN W. CLARKE & CO., A CORPORATION,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

This case comes to this Court upon a judgment entered on a verdict of a jury in favor of the defendants-respondents. That verdict and judgment were affirmed by the Court of Appeals, and that Court recognized that this was essentially a factual case. The Court said:

> "The jury believed Clarke. Dooley's testimony cannot be the basis for a judgment n. o. v." (Petition, 5a).
>
> • • • • •
>
> "This lawsuit grew out of a complicated factual background. The issues of fraud and breach of fiduciary relationship in the last analysis presented questions

> of credibility and fact. The jury was in the best position to make a determination of these facts." (Petition, 7a.)

Petitioners' Statement of the Case omits many of the pertinent facts decided by the jury and is wholly misleading as to other facts—indeed in its entirety. That this is true is demonstrated by the following example. The Petition states:

> "During the acquisition of the above securities, Dooley did not know in what capacity the respondents were acting. (A. 457, 486) Dooley first learned of it in April 1963, when another broker informed him that respondents had been selling to the petitioners as principals at an unusual profit. (A. 457, 492)" (Petition, 9-10).

On the contrary, the Court of Appeals said:

> "Further, the plaintiffs assert that they did not know the difference between a principal and an agent in securities transactions until 1963. This was a question of credibility for the jury. Further, the confirmation of each sale made by the defendants to the plaintiffs stated whether the confirmed sale was made with the defendants acting in their capacity as principal or agent. The jury had reason to believe that the plaintiff, Dooley, especially in light of his legal experience and the volume of his previous securities transactions, was fully cognizant of Clarke's role as underwriter." (Petition, 4a.)

Here is what happened below.

I.

Nature of the Action and Proceedings Below.[1]

Count I of the petitioners' amended complaint charged the respondents with a breach of a fiduciary relationship and with the violation of the anti-fraud provisions of the Securities Act of 1933 (Sections 12(2) and 17(a)(1)(2) and (3)) and of various anti-fraud provisions of the Securities Exchange Act of 1934 and the rules promulgated thereunder (Sections 10(b) and Rule 10b-5 and Section 15(c)(1) and Rule 15c 1-2). Count II of the amended complaint charged the respondents with a violation of Section 15A (b)(7) of the Exchange Act and Sections 1, 2 and 18 of Article III of the Rules of Fair Practice of the National Association of Securities Dealers (A. 76-95).

Count II of the amended complaint was dismissed on motion on May 12, 1967 (A. 152-3).

Count I alleged intentional and deliberate and wilful and wanton violations of the anti-fraud provisions of the Securities Act and the Exchange Act in that:

(a) Defendants sold to plaintiffs a substantial portion of each underwriting Clarke & Co. participated in for the purpose of realizing an underwriting profit which was larger than the commission charged in connection with the purchase of a listed security and for the purpose of avoiding any possible liability on the underwriting liability of Clarke & Co.

---

1. References to the record and the appendices filed in this cause are designated as follows:

Plaintiffs-Appellants' Appendix—"A."
Defendants-Appellees' Appendix—"DA."
Defendants-Appellees' Appendix of Exhibits—"Ex. Vol."
Transcript of Proceedings—"Tr."
Defendants' Exhibit —"DX".

(b) Defendants did not advise plaintiffs of the "risks inherent" in the securities purchased by plaintiffs.

(c) Clarke & Co. consistently took a position adverse to the plaintiffs in that Clarke & Co. dealt as a principal with plaintiffs.

(d) Defendants did not recommend or sell securities to the plaintiffs which were suitable for them; did not handle plaintiffs' accounts in a manner consistent with their objectives; and did not deal fairly with the plaintiffs.

(e) Defendant Clarke represented that he was purchasing large blocks of the securities being offered to the plaintiffs for the account of his wife and that he held large blocks of such securities (A. 79-81).

Defendants' denied the essential allegations of the amended complaint (A. 96-108). The case was tried to a jury on the issues formed by the amended complaint and answer thereto. The jury returned a verdict finding the issues for the defendants and against the plaintiffs, and judgment was entered on the verdict (A. 176-8).

II.

Facts Relevant to the Issues Raised by the Petition.

The Parties.

Plaintiff James A. Dooley is an attorney who has been continuously engaged in the practice of law since 1941 (A. 435-6). He acted on behalf of himself and all other plaintiffs (A. 442).

John W. Clarke is the president of John W. Clarke & Co. which is located in Chicago, Illinois (A. 270). Clarke has been in the securities business since 1933, and since

1934 has been registered as a broker-dealer with the Securities and Exchange Commission (A. 270, 293). Clarke & Co. at all times material hereto was engaged as a broker, dealer, underwriter and trader of securities, both stocks and bonds, particularly bonds (A. 107, 420-1). In the years 1958 through 1963, Clarke & Co. had two active employees—Clarke and Mary Murphy (A. 270, 1038).

Although not a member of any stock exchange, Clarke & Co., as a member of the NASD, could purchase or sell listed securities in the "third market." The "third market" is an over-the-counter market in listed securities where such securities are traded between dealers at prices comparable to concurrent exchange transactions (A. 779-784).

Underwritings and Prospectuses.

The preliminary prospectus, which is a part of the registration statement filed with the S. E. C. in connection with an underwritten public offering, contains information pertinent to the proposed offering and to the securities being offered (A. 762). It contains a description of the issuer's business and products, a description of the management of the issuer and their financial interest in or material transactions with the issuer, a description of the amount and nature of the securities proposed to be offered and the market price history of such securities (A. 762). The preliminary prospectus also includes a balance sheet of the issuer and income statements for several prior years and interim periods (A. 762). Also included is the name of the managing underwriter (A. 762).

Shortly before the managing underwriter anticipates that the registration statement covering the offering will be made effective or released by the S. E. C., the issue is "priced"—that is the price to be public and the underwriting spread, profit or discount is established (A. 792-3,

795). Subsequent to effectiveness, the securities covered by the registration statement are offered to the public by the managing underwriter and the sub-underwriters (A. 794).

On the date of the offering of the securities to the public, a prospectus (as distinguished from a preliminary prospectus or "red herring" prospectus) is printed in final form and distributed by the managing underwriter to all members of the underwriting group (A. 764-6). This final form of prospectus contains the information which was set forth in the preliminary prospectus, and in addition the terms of the offering, the price of the security, the gross amount of underwriting profit, and the name of each underwriter and sub-underwriter (A. 764, DX 146-165). The front or cover page of the final prospectus invariably shows that the offering is an underwriting. Moreover, set forth on this page, in tabular form and on a "per-share" basis, is the price of the security to the public and the gross underwriting discount or profit (Ex. Vol. 204-239).

Underwriting Activities of Clarke & Co.

Subsequent to acceptance of an invitation to participate in an underwriting, a number of printed preliminary prospectuses are received by Clarke & Co., and these prospectuses are sent to those customers who in Clarke's judgment might be interested in the offering or who have already indicated an interest in the offering (A. 289, 305-6, 1042, 1047).

When the offering becomes effective, Clarke contacts those of his customers to whom he has sent a preliminary prospectus and whom have indicated an interest in the offering to ascertain whether they wish to purchase the security (Tr. 115). If in response to this solicitation a customer purchases securities which are underwritten by Clarke & Co., a confirmation of the sale is mailed to the customer (A. 287, 1040, 1081). If the final form of prospectus is in

the possession of Clarke & Co. at the time of the mailing of the confirmation, such prospectus is mailed together with the confirmation (A. 1083). If the final form of prospectus is not available when the confirmation is mailed on the day of the transaction, it is mailed to each purchaser as soon as it is obtained by Clarke & Co. (A. 1083).

Payment for Securities and the Confirmation.

Payment is due in connection with the purchase of a security from a broker-dealer on the payment, delivery, or settlement date, which is usually four business days following the transaction but in the case of underwritings it is seven days (A. 797).

With respect to each purchase of a security (whether underwritten or otherwise) from or through Clarke & Co., a confirmation is mailed by Clarke & Co. to the customer on the day of the transaction (A. 1040). This document sets forth the following information:

(a) The name and address of the customer.

(b) The name and quantity of the security.

(c) Whether Clarke & Co. acted in the capacity of principal or of agent.

(d) The amount of the commission if Clarke & Co. acted as agent.

(e) The amount due Clarke & Co., and the date said amount is due (A. 1041, Ex. Vol. 184).

In addition, with respect to securities which are the subject of a new offering, a legend is stamped upon the confirmation which reads: "When, As, and If Issued." (Ex. Vol. 147-8, 151-6, 158-9, 164-6, 170).

Plaintiffs' Experience and Manner of Record-Keeping With Respect to Securities Transactions.

A classmate of Dooley in law school in the years 1934 through 1937 was John F. Baker, who had been engaged in the securities business since 1929 and who has been constantly interested in the securities markets since that time (A. 424-5). In 1934, Dooley and Baker became close friends, and thereafter they discussed securities constantly through the years and at least once a week (A. 425). Dooley bought his first securities through Baker in 1938 or 1939, and thereafter through 1958 he had securities transactions with Baker (Baker, Walsh & Co.) and other broker-dealers (A. 425, 443, 529). With respect to the securities that were purchased by Dooley from or through Baker, the ideas with respect to such transactions were in some instances originated by Dooley and in other instances originated by Baker (A. 432-3). In addition, from 1955 to 1968, Dooley had bought and sold government bonds on several occasions (A. 531).

During the period in which Dooley dealt with Clarke (1958 through 1962), he also dealt in securities with the Illinois Company, and in this regard he had conversations with a vice-president of that firm (A. 677-8, 861).

During the years 1958 through 1963, the plaintiffs kept a file for each security that was purchased by them (A. 498). Included in such files were the confirmation with respect to the transaction, the stock certificate, and a prospectus if there was one (A. 498). These files were kept in a file cabinet in Dooley's home (A. 524).

In addition to the files that were maintained with respect to each security purchased, the plaintiffs kept certain record books with respect to all securities transactions (A. 498-9). There were two books—one a black book which

contained the records of current transactions and one a white book which contained records of those securities which had been sold or disposed of by plaintiffs (A. 498-9, 503). These books contained various sheets, and each sheet referred to each particular stock or bond purchased by the plaintiffs, including those purchased through Clarke & Co. (A. 500). With respect to each such sheet, the following information is recorded on the front side of the sheet:

(a) The name of the security.

(b) Whether the security was a common or preferred stock, and its par value.

(c) Whether the security was owned outright, was margined, or was in use as collateral, and if deposited as collateral the place where it was deposited.

(d) The name of the particular plaintiff in whose name the security was registered.

(e) The date the security was purchased, the number of shares purchased, the price per share, the buying expense, if any, and the total cost of the securities purchased.

(f) The date the securities were sold, the number of shares sold, the price per share, the selling expense, if any, and the total proceeds received from such sale.

(g) A calculation of the net gain or loss on the transaction, and whether such loss or profit was "short term" or "long term".

(h) The broker or brokers through whom the security had been purchased and/or sold (A. 504).[1]

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1. The front side of each of the sheets which were obtained by the defendants at the trial (all of which were offered and received in evidence) are reproduced in the Defendants-Appellees' Appendix of Exhibits on each even-numbered page commencing at p. 20 and concluding at p. 72.

The reverse side of each of the plaintiffs' sheets contained the following information:

(a) The date, rate, and gross amount of any dividends received.

(b) The particular securities market where the stock was traded or that section of a particular publication that reflected market transactions or quotations for the security.

(c) The market quotation for the security as of various dates. [1]

The entries on these various sheets were made by Mrs. Dooley (A. 498-9). These books also contained sheets for each stock or bond that Dooley purchased in the period in question through the Illinois Company and through Baker, Walsh & Co. (A. 500).

During the period 1958 through 1962, Dooley subscribed to the Wall Street Journal and that financial publication was delivered to his home (A. 505). He examined the Wall Street Journal (A. 652). Likewise, he kept track of the market quotations of some securities "by heart" (A. 652).

Initial Transactions Between Dooley and Clarke & Co.

In July, 1958, at the suggestion of a mutual friend who was a lawyer, Clarke invited Dooley to have lunch with him (A. 308-10, 443-4). Clarke's purpose in calling and meeting with Dooley was to sell him securities, and securities were discussed at the luncheon (A. 311). After lunch Dooley returned to Clarke's office and placed an order to purchase $10,000 in principal amount of each of three different revenue bonds (A. 445, Ex. Vol. 142-4). Subsequent to these transactions, Clarke telephoned Dooley

1. The reverse side of each sheet is reproduced in the Defendants-Appellees' Appendix of Exhibits on each odd-numbered page commencing at p. 21 and concluding at p. 73.

4 or 5 times in 1958, but no more securities were sold to Dooley in that year (A. 313).

On June 16, 1959, Clarke wrote to Dooley and informed him of the current market for each of the revenue bonds which had been sold to Dooley in July, 1958. In addition, Clarke sent to Dooley a report concerning the Calumet Skyway revenue bond situation (Ex. Vol. 4). On November 13, 1959, Clarke wrote to Dooley and described the "tax selling" in the Calumet Skyway issue and stated that the bonds at the then current price were an interesting speculation (Ex. Vol. 5). On December 28, 1959, Clarke & Co., as principal, sold and confirmed to Dooley $35,000 in principal amount of such revenue bonds (Ex. Vol. 145). This was the only transaction had between Clarke and Dooley in 1959.

On the morning of July 20, 1960 Dooley called Clarke, and after receiving the market quotation for the Illinois Toll Highway bonds, placed an order to purchase 20 of such bonds for his wife (A. 852). During this conversation, Dooley also stated that he wished to purchase some utility stocks. Clarke suggested four utility stocks—Pioneer Natural Gas, Northern Illinois Gas, Arizona Public Service, and Tucson Gas and Electric (A. 852, Ex. Vol. 90). Clarke stated that he would obtain "markets" for each of these stocks, and he suggested that they have lunch to discuss these stocks (A. 853, Ex. Vol. 90). After Clarke had obtained the markets on these securities, he met Dooley for lunch. At lunch taxes, inflation and the utility stocks were discussed, and Clarke gave Dooley the market quotations he had obtained (A. 853). Dooley did not purchase any of these stocks from or through Clarke & Co. (A. 853). Instead, on that very day, Dooley purchased such securities—Northern Illinois Gas, Tucson Gas and Electric, and Arizona Public Service—through Baker, Walsh & Co. (A. 426, DX 2).

Revenue Bond Purchases in September and October, 1960.

During August and early September, 1960, Clarke called Dooley 2 or 3 times and described to him the market in the Calumet Skyway bonds and stated that the bonds looked attractive at the then current price as a speculation (A. 854). In response to these conversations, Dooley stated that he would think the matter over (A. 854). On September 13, 1960, Clarke called Dooley and stated to him that the Calumet Skyway bonds were selling between 55 and 60, that the bonds were still paying interest, that he thought they were a good speculation, and that he could offer Dooley $175,000 in principal amount of the bonds (A. 845-5). Dooley stated that he would buy them (A. 855). Clarke & Co., as principal, sold to Dooley $175,000 in principal amount of such bonds for approximately $101,000; and a confirmation, which disclosed the capacity in which Clarke & Co. acted, was mailed to Dooley on that day. (Ex. Vol. 91, A. 854-6).

The following day Dooley called Clarke and complained to Clarke about the price that he had paid for the Calumet Skyway bonds.

Dooley said, "I looked in the paper, and I think your price was too high on the Skyways." (A. 856-7).

Clarke replied: "The paper does not sell the bonds, and the markets quoted in the papers are for $10,000 and $25,000 lots. When you buy $175,000, which is a large amount of these bonds, the price is not the price that is reflected in the paper. Instead of complaining, why don't we have lunch." (A. 857).

Later that day (September 14), Clarke and Dooley had lunch at the Attic Club. They discussed revenue bonds, and Dooley stated at the luncheon that he was interested in avoiding taxes and in combating inflation (A. 857, 966).

Further, Dooley stated that he had a large sum of money to invest, and he requested Clarke to prepare a list of bonds from which he (Dooley) could make selections (A. 857). Clarke stated that he would make up such a list and submit it to Dooley (A. 857). After lunch Clarke returned to his office and prepared a list of suggested bonds (A. 857). This list, which was dated September 14, 1960, set forth with respect to eleven different bond issues: the name of the issue, the price, and the present "yield" (Ex. Vol. 92, A. 858). On the day of its preparation, this list was sent to Dooley (A. 967).

On September 16, 1960, Dooley called Clarke with reference to that list and said that he would "take" a "hundred" Illinois Toll Highway bonds, "fifty" of the Second Lake Washington Toll Bridge bonds and "fifty" of the Mackinac Bridge bonds (A. 859). He told Clarke to put the bonds in the name of the Avern Trust (A. 859). Confirmations, reflecting these transactions and the capacity in which Clarke & Co. acted, were mailed to the Avern Trust at Dooley's office address (A. 859, Ex. Vol. 99-101).

On October 6, 1960, Dooley called Clarke and said that he "liked" the Illinois Toll Highway revenue bonds and that he wanted another "hundred" of them (A. 860). Clarke gave him the then current market quotations for the bonds, and Dooley said, "OK, go ahead." (A. 860). Thereupon, Clarke & Co. sold and confirmed $100,000 in principal amount of Northern Illinois Toll Highway bonds to the Avern Trust (Ex. Vol. 103, A. 860).

Transactions from November, 1960 through July, 1961.

Prior to November, 1960, Clarke & Co. was a member of an underwriting group with respect to a registered secondary offering of the shares of Champion Spark Plug Company (A. 333). Champion Spark Plug Company was listed

on the New York Stock Exchange (DX 146). After sending Dooley a copy of the preliminary prospectus, Clarke had 2 or 3 conversations with Dooley about these securities, and he told Dooley that Mrs. Clarke owned Champion Spark Plug Company (A. 333-5).[1] On November 16, 1960, Clarke & Co. sold Dooley 400 shares of Champion Spark Plug common stock (A. 376). A confirmation was sent to plaintiffs, disclosing that Clarke & Co. acted as principal; in addition, a final form of prospectus, which disclosed the amount of underwriting profit and the fact that Clarke & Co. was an underwriter in the offering was also sent to the plaintiffs (A. 379, 422, Ex. Vol. 204-5, 147).

In December, 1960, Clarke & Co. became a member of an underwriting group with respect to an issue of the shares of Business Capital Corporation (A. 381). Thereafter, Clarke mailed Dooley a copy of the preliminary prospectus, which set forth, *inter alia*, the amount of the underwriting profit and the fact that the securities being offered were speculative (Ex. Vol. 186-8, A. 381). Prior to February 8, Clarke told Dooley that he was an underwriter of the issue (A. 391-2). On February 8, 1961, Dooley purchased 5,000 shares of Business Capital Corporation at $10 per share from Clarke & Co. This transaction was confirmed to Dooley, and a final form of prospectus was sent to him (A. 422, Ex. Vol. 148, 206-7).

Between January, 1961 and July 3, 1961, Dooley purchased shares of the following companies from or through Clarke & Co.: Metro-Goldwyn-Mayer, Ford Motor Company, Northern Illinois Gas, and Pioneer Natural Gas—all listed securities with the exception of Pioneer (Ex. Vol. 241, DX 84). In each case a confirmation was sent to the particular plaintiff; and, if the security was underwritten, copies of the preliminary and final forms of pros-

1. At this time, Mrs. Clarke owned shares of Champion Spark Plug Company (A. 334).

pectus were likewise sent (A. 422, Ex. Vol. 149-50, 191, 208-9).

During the period January, 1961 through August, 1961, Clarke sent Dooley several documents for his consideration with regard to securities Dooley had purchased or had inquired about (Ex. Vol. 107-119). These documents evidence the fact that Dooley was relying not upon Clarke's judgment but upon his own in connection with securities transactions.[1] This is particularly apparent with respect to Crowell-Collier Publishing Company. Clarke sent to Dooley a detailed Standard & Poors Report on that company and a comparison of that company with other publishing companies (Ex. Vol. 114-117). The covering letter stated:

> "On the subject of Crowell-Collier, here is the Standard & Poors' deal, also a comparison of companies of this type, from which you will be able to have an informed opinion as to what to do on Crowell-Collier." (Ex. Vol. 113).

Dooley did not purchase these securities (Ex. Vol. 247-251).

Inland Life and Subsequent Transactions.

Shortly after May, 1961, Clarke & Co. became a member of an underwriting group with respect to an offering of Inland Life Insurance Company (A. 389, Ex. Vol. 189). Dooley knew that Inland was a promotional life insurance company and that this was a new issue. Dooley was also acquainted with its president (A. 627, 657).

A preliminary prospectus concerning this offering was sent to Dooley, and this prospectus disclosed that the securities offered were speculative and that there was no prior quoted market for these shares (Ex. Vol. 189).

1. There was correspondence in subsequent periods (Ex. Vol. 123-6, 129-136).

On July 6, 1961 Dooley purchased 3750 shares of Inland Life from Clarke & Co. (A. 390, Ex. Vol. 153). On that day a confirmation was mailed to Dooley, together with a final form of prospectus (A. 422, Ex. Vol. 153, 189, 88-9, DX. 29). Concurrently with this purchase, Dooley called the Illinois Company, and Dooley solicited and purchased an additional 100 shares of Inland Life from that broker-dealer (A. 880-2).

Inland Life, which was offered at $4 per share, went to an immediate "premium". On September 30 it sold at 8⅜, on October 30 at 12¾, and on November 30 at 19¼ (Ex. Vol. 255, DX 175).

On August 15, 1961, Clarke sent Dooley a directors' report on Business Capital, including financial statements, which he had received from the managing underwriter (Ex. Vol. 74-78, 206).

The note accompanying the report stated:

> "Here is a confidential memo on the Business Capital Corporation which you might take a look at and return as it is for underwriters only." (Ex. Vol. 74).

The following table reflects the transactions had between Clarke and Dooley subsequent to the Inland Life underwriting and through mid-November, 1961.

Security	Cost	Capacity of Clarke & Co.
Calandra Photo, Inc.	$ 5,000	Underwriter-Principal
Richard D. Irwin, Inc.	4,800	Underwriter-Principal
Arlan's Department Store, Inc.	4,050	Underwriter-Principal
International Harvester Company	50,000	Secondary Offering-Principal
Cowles Magazine & Broadcasting, Inc.	11,600	Underwriter-Principal
Sears Roebuck & Company	83,097	Agent
Arizona Public Service Company	85,051	Agent
Western Natural Gas Company	52,098	Agent
American National Insurance Company	37,762	Agent
Handschy Chemical Company	12,000	Underwriter-Principal [1]

1. Ex. Vol. 249, 154-164.

With respect to each of the foregoing listed offerings which were underwritings, the plaintiffs were sent a copy of the preliminary prospectus prior to the actual offering; and on or within a day after the offering, they were sent a copy of the final form of prospectus (Ex. Vol. 190, 192-3, 210-219). In addition, a confirmation was sent which disclosed the capacity in which Clarke & Co. acted (Ex. Vol. 154-64, A. 422). After receipt thereof, Dooley paid for the securities (A. 507, Tr. 982).

Demand for New Issues in 1961.

In the latter part of 1961, the demand of the investing public for new underwritten issues of securities was "unprecedented" (A. 767-8). Generally, these issues almost

immediately went to a premium over the offering price (A. 769-71, Ex. Vol. 255). This was particularly true with respect to the offerings of the shares of Richard D. Irwin, Inc., Arlan's Department Stores, and Inland Life (A. 769-70).

In November, 1961, Clarke called Dooley and told him that the Calumet Skyway bonds were "trading flat"[1] at around 65 but that he had heard that the Calumet Skyway would be able to and would make the January 1, 1962 interest payment (A. 895).[2] He suggested that Dooley buy 100 bonds (A. 895). Thereafter, Clarke & Co. sold Dooley $100,000 in principal amount of such bonds (A. 895, Ex. Vol. 105). In his conversation with Dooley, Clarke did not explain the term "trading flat", nor was he requested to do so (A. 895-6).

Clarke & Co. in November, 1961, was an underwriter of an offering by First Western Financial Corporation (A. 893). None of these securities were offered to Dooley (A. 893). This stock was offered at $15 per share, and it immediately rose to a price of $22 or $25 (A. 894). Dooley heard about First Western from a friend Charles Gallagher who had bought the stock from Clarke & Co. (A. 676-7). Dooley called Clarke and inquired as to whether Clarke had been in the offering, stating that he (Dooley) had understood the offering was "hot" (A. 894). Dooley complained that he had not received any shares, and then said to Clarke: "I want to be in your hot deals . . . I am giving you nearly all of my business." (A. 894-5.)

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1. Generally, bonds are traded, purchased or sold at a sum certain (for example 65) plus accrued interest (interest accrued from the last coupon date). In the event that the bonds are in default as to interest or there is a serious question as to the future payment thereof, such bonds are traded flat or without any provision for accrued interest (A. 895-6).

2. The interest was paid in January, 1962 (A. 897).

Dispute Over Calumet Skyway Revenue Bond Coupons.

Prior to the foregoing transactions, in April, 1961, while Clarke was out of the office, Dooley called Miss Murphy, an employee of Clarke & Co., and requested certain interest coupons on some Calumet Skyway bonds which were being held in safe-keeping at the Continental Bank (A. 1066). Since the coupons had matured sometime previously, Miss Murphy told Dooley that undoubtedly the bank had "clipped" the coupons, cashed them, and sent Dooley the proceeds because the bank often did that as an accommodation (A. 1066-7). Dooley said that he had not received any check, that he "could raise hell" for Clarke because Clarke "had no authority to do such a thing", and that he wanted the coupons (A. 1067).[1]

As a result of the foregoing dispute, when the subject arose as to the clipping of the coupons with respect to any interest due on the Calumet Skyway bonds purchased on November 30, 1961, Clarke requested that Dooley write a letter authorizing Clarke & Co. to clip the coupons on Dooley's behalf and remit the proceeds to him (Tr. 1840). Thereupon, Dooley, gave written authorization to Clarke & Co. to "clip" such coupons (Ex. Vol. 106).

Transactions from December, 1961 to May, 1962.

In the latter part of 1961, Dooley requested Clarke to obtain shares for him in two different underwritings (in which Clarke & Co. was not an underwriter) of new issues —North American Acceptance Corporation and Kellwood Company (A. 400-1, Ex. Vol. 126). The shares obtained in these underwritings by Clarke & Co. at Dooley's request were sold to the plaintiff designated by Dooley, and a con-

1. In fact, the bank had issued a check to Dooley in January, 1961 for the proceeds of these interest coupons (A. 1063-5).

firmation and prospectus were sent to that plaintiff (A. 422, Ex. Vol. 165-6, 220-1).

From mid-December, 1961 through May 10, 1962, the plaintiffs had a number of transactions with Clarke & Co. which are reflected below.

Security	Cost	Capacity of Clarke & Co.
Tip Top Products Company	$61,600	Underwriter-Principal
Sel-Rex Corporation	11,000	Underwriter-Principal
Sears, Roebuck & Company	40,485	Agent
Pauley Petroleum Company	41,297	Agent
Western Natural Gas Company	18,250	Agent
Krylon, Inc.	10,000	Underwriter-Principal
Western Natural Gas Company	15,977	Agent
Western Natural Gas Company	7,988	Agent
Marsh & McLennan, Incorporated	22,250	Underwriter-Principal
Morse Shoe Company, Inc.	16,000	Underwriter-Principal
Washington National Insurance Company	27,000	Principal
"21" Brands, Inc.	8,000	Underwriter-Principal
Ford Motor Company	48,500	Underwriter-Principal
Arlan's Department Stores, Inc.	17,250	Underwriter-Principal[1]

1. Ex. Vol. 87, 167-174, 176-9, 250.

With respect to each of these transactions which were underwritings, the plaintiffs were sent a copy of the preliminary prospectus prior to the actual offering; and on or

within a day after the offering, they were sent a final form of prospectus (Ex. Vol. 222-237, 194-6, 198-202). Moreover, with respect to each of these transactions, a confirmation was sent to the particular plaintiff (Ex. Vol. 87, 167-174, 176-9, A. 422).

The Stock Market Decline of May, 1962.

The unprecedented demand for new, underwritten issues of securities continued through the first part of 1962 (A. 771-2). On May 28, 1962, the market in listed securities sold off and went down substantially and severely (A. 774). As measured by the Dow-Jones Average, on that day the listed market was down $28 (A. 774). This sell-off was the second most severe in the history of the New York Stock Exchange,[1] being surpassed only by the events of 1929 (A. 775). The market prices of securities traded in the over-the-counter market followed the listed market down (A. 777). Generally, the stocks purchased by Dooley had substantially appreciated in value prior to such decline; subsequent thereto, Dooley had unrealized losses in such securities (Ex. Vol. 255-6).

In the summer of 1962, plaintiffs purchased two additional underwritten securities from Clarke & Co. which were the subject of registered secondary offerings—General Motors Corporation and Arizona Public Service Company (Ex. Vol. 181-2).

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1. Dooley, in his testimony, characterized this event as the "crash" (A. 646-7). We agree with that description.

Underwritings Participated in by Clarke & Co. and Purchased by Plaintiffs in the Period 1958 through 1962.

The following tabulation sets forth the number of underwritings participated in by Clarke & Co. in each of the years 1958 through 1962 (the period during which Dooley dealt with Clarke & Co.) and the number of such underwritings which were purchased by the plaintiffs from Clarke & Co. in each such year.

Year	Underwritings Participated In By Clarke & Co.	Underwritings Purchased By Plaintiffs
1958	16	None
1959	25	None
1960	23	1
1961	40	13
1962	29	9[1]

1. Ex. Vol. 240-6, 247-251.

Types of Transactions and Types of Securities Purchased by Plaintiffs.

An analysis of all of the security transactions between the plaintiffs and the defendants reveals the following with respect to the type of tranactions consummated:

	Cost	Percent of Total
Principal Transactions (other than underwritings)	$ 563,550.00	35.40%
Principal Transactions (underwritings)	514,587.50	32.31%
Agency Transactions	514,257.25	32.29%
Total Purchases	$1,592,394.75	100.00%[1]

1. Ex. Vol. 252.

The following table reflects the various types of securities purchased by the plaintiffs from the defendants.

	Cost	Percent of Total Purchases
Bonds	$ 506,550.00	31.81%
Listed Stocks	541,321.70	33.99%
Unlisted Stocks	544,523.05	34.20%
Total Purchases	$1,592,394.75	100.00%[1]

1. Ex. Vol. 253.

Aborted Government Bond Transaction of September, 1962.

On Saturday, September 29, 1962, Dooley called Clarke at his home and said that he was at the close of his fiscal year and that he wanted to purchase $1,000,000 in government bonds which were selling at a discount (A. 934). Dooley further stated he wished to prepay the interest [apparently on a loan to be obtained to acquire the funds to purchase the government bonds][1] so as to get a tax deduction and that at maturity when the bond was paid at a par ($1,000,000) he would have to pay only a capital gains tax on the difference between the price paid for the discounted bonds and par (A. 934-5). Dooley further stated that he wished to obtain such a bond which would mature in eighteen or twenty-four months (A. 935). Clarke replied that he did not have the government bond "sheets" at home but that he would look at them on Monday, check the markets, and call Dooley (A. 935).

On Monday morning, Clarke examined the government bond sheets and obtained market quotations on three dif-

1. Cf. Dooley's statement to the District Judge during the argument on the admissibility of this conversation (A. 916).

ferent discounted government bonds (A. 936). He then called Dooley, read the list of bonds upon which he had obtained quotations, and gave him the market quotations for each of those bonds (A. 936). Dooley said the "2⅝[s] of [19]65" were the bonds that fit his purpose (A. 936). Dooley requested the market quotations again, received them from Clarke and then said, "I still think the 2⅝[s] are the ones." (A. 936). When Clarke asked him if he wanted to then buy the bonds, Dooley said, "No, I will let you know." (A. 936).

On the next day, Dooley called Clarke and asked him to check the "2⅝[s]" again. Clarke then checked the market for these bonds with the Continental Bank and two other bond dealers and made a memorandum of these quotations (A. 936). Clarke then called Dooley and said that he could offer the bonds to Dooley at 98 28/32[1] (A. 937). Dooley said that he would think it over and let Clarke know (A. 937).

At noon that day, while Clarke was at lunch, Dooley called Clarke and said to him, "I can buy those bonds at 55/64."[2] He then asked Clarke if he wanted to "meet" the price (A. 937). Clarke refused and said, "It's 28/32." (A. 937).

Dooley did not purchase these bonds from Clarke & Co. (A. 939).

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1. With respect to government bonds, market quotations are made on a "hundred dollar basis" although such bonds are not sold or traded in $100 units, but primarily in units of $5,000 or greater. Consequently, the market quotation 98 28/32 in fact means that a $1,000 bond is being offered at $988.75 and that a $10,000 bond is being offered at $9,887.75. Consequently, the offering price on $1,000,000 in government bonds at 98 28/32 is $988,750.00. The functional and customary manner of dealing in government bonds between dealers is in "thirty-seconds" (A. 937).

2. The difference between 28/32 and 55/64 is 1/64 which is approximately 15¢ per $1,000 bond or $150.00 on $1,000,000 in bonds, an approximate price differential of .015 per cent [sic].

THE WRIT SHOULD NOT BE GRANTED.

I.

The Decision Below Is Absolutely Consistent With Buttrey v. Merrill Lynch, and Therefore There Is No Conflict of Decisions Within the Seventh Circuit.

Petitioners' first reason why a writ should be granted is not within the purview of the considerations pertaining to certiorari outlined in Rule 19 of this Court. Apart from that, to assert that there is a conflict between this case and *Buttrey* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 410 F. 2d 135 (7th Cir., 1969); cert. den. 396 U. S. 838, is simply to misstate the issue. Moreover, the statement at page 13 of the Petition that "the Court of Appeals admitted that the N. A. S. D. rules are for the protection of the public as is Rule 405 of the New York Stock Exchange" is untrue, for the Opinion is absolutely bare of any such statement—let alone admission.

In *Buttrey, supra,* the District Court had concluded on the pleadings "that the bankruptcy trustee was the proper party to prosecute the alleged causes of action, and that each of [the] counts [of the complaint] adequately states a claim." p. 137. Count I of that complaint alleged a cause of action based upon an alleged violation of Rule 405 of the Rules of The New York Stock Exchange. Rule 405, which is in no way involved in this case, requires, *inter alia,* members to ascertain "the essential facts" with respect to every customer, order and account.[1]

The Court of Appeals, *on the basis of the pleadings,* affirmed the District Court's ruling, stating:

> "We do not decide that an alleged violation of Rule 405 is *per se* actionable." p. 142.

* * * * * *

1. This rule is set forth in full in *Buttrey, supra,* at p. 141.

> "Until this case is *actually tried*, it will be impossible to ascertain whether defendant has violated Rule 405, and if so, whether the violations justify the imposition of liability." Emphasis supplied. p. 143.

Apart from the fact that the *evidence adduced at the trial herein is* incomparable with the allegations of the complaint in *Buttrey*, we submit that the holding in this case is in complete accord. In *Buttrey*, the Court of Appeals relied to a substantial extent upon the opinion of Judge Friendly in *Colonial Realty Corporation* v. *Bache & Co.*, 358 F. 2d 178 (2nd Cir., 1966); cert. den. 385 U. S. 817. The Court said:

> "Using the *Borak* case as a springboard, in Colonial Realty Corporation v. Bache & Co. . . ., Judge Friendly noted that the Stock Exchange Rules can play an integral part in SEC regulation. The Court summed up this principle as follows (at p. 182):
>
> > 'What emerges is that whether the courts are to imply federal civil liability for violation of exchange or dealer association rules by a member cannot be determined on the simplistic all-or-nothing basis urged by the two parties; rather, the court must look at the nature of the particular rule and its place in the regulatory scheme, with the party urging the implication of a federal liability carrying a considerably heavier burden of persuasion than when the violation is of the statute or an SEC regulation. The case for implication would be strongest when the rule imposes an explicit duty unknown to the common law.'"
> p. 142.

In effect, the Court in *Buttrey* decided, consistent with *Colonial*, that the determination of whether a federal cause of action exists for the violation of a stock exchange rule was to be governed by whether such rule was intended for the *direct* protection of investors. There is nothing incon-

sistent in this case with that holding; instead, the instant case extends the rationale of *Buttrey* and *Colonial* so as to make actionable a violation of Section 2 of the Rules of Fair Practice of the NASD which requires members to make suitable recommendations of securities to their customers. Hence, this case is not in conflict with *Buttrey* or *Colonial* but is consistent therewith and an extension thereof.

Petitioners' real complaint is not with the rule of law enunciated by the Court of Appeals but with its failure to reverse because of the District Court's dismissal of Count II. The Court of Appeals, after an exhaustive examination of the evidence in the case (Petition, 2a-3a), concluded that the Petitioners were not prejudiced by the dismissal of Count II. The Court held that such cause of action had been in fact litigated by (and adversely to) Petitioners under Count I. This is absolutely true.

Count II alleged a violation of Section 1 of the NASD rules (conduct inconsistent with just and equitable principles of trade); Section 2 of the rules (suitability of recommendations); and Section 19 of the rules which provides:

> "No member shall effect any transaction in, or induce the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance." (A. 84.)

Count I of the Amended Complaint, under which the issues were found by the jury for the respondents-defendants, *inter alia*, charged:

1. The violation of a fiduciary relationship by the defendants, which said violation was alleged to involve, among other things, failure to recommend suitable securities to the plaintiffs. Count I, pars. 4-9 (A. 77-81).

2. That the defendants engaged in fraudulent conduct which consisted of, *inter alia*:
   a. The failure of the defendants to "handle plaintiffs' accounts in a manner consistent with the objectives of the plaintiffs." Count I, par. 9(f) (A. 80).
   b. The failure of the defendants to "recommend or sell securities to the plaintiffs which were suitable for them. . . ." Count I, par. 9(g) (A. 80).
   c. The failure of the defendants to "deal fairly with the plaintiffs." Count I, par. 9(j) (A. 81).
3. That the factual allegations of fraudulent conduct (eleven in number which are pleaded in paragraphs 9(a) through 9(k) of Count I) constituted violations of:
   a. Sections 12(2) and 17(a) of the Securities Act.
   b. Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder.
   c. Section 15(c)(1) of the Exchange Act and Rule 15c 1-2 promulgated thereunder (A. 79-82).

Moreover, the factual allegations in paragraphs 1 through 10 of Count I were incorporated by reference into Count II (A. 83).

That the theory of Count II was in fact *tried* under Count I is evident from the opening statement by plaintiffs' attorney (DA 6, 8-10, 12-13). Specifically, the attorney said:

> "As I mentioned to you, Mr. Dooley in his conversation with Mr. Clarke in September, 1960, when this first became a very close relationship—he told him that he was interested in stable securities. Yet, I think the evidence will demonstrate to you that the stocks that

> Mr. Clarke persuaded Dooley to buy and the stocks that he offered him to buy by and large were little known, untried issues, contrary to the investment program that Mr. Dooley had outlined to Mr. Clarke as his desire." (DA 13.)

Clearly there is no conflict whatever between this case and *Buttrey*. Furthermore the Petitioners were not, in fact or in law, prejudiced by such dismissal; and the Court of Appeals finding of a lack of prejudice after a review of the record is not a fit subject or good reason for certiorari.

II.

The Opinion Below Is Not in Conflict With Any Decision of This Court or the Courts of Appeals of the Second and District of Columbia Circuits With Regard to the Necessary Elements to Be Established in a Private Action Under the Securities Act or Exchange Act.

There is no statement whatever in the opinion below which sets forth what must be pleaded and proved in an action for damages under the anti-fraud provisions of the Acts, and for that reason alone this is not a case for certiorari. The statement at page 16 of the Petition that the "Court of Appeals regarded intent necessary. . . ." is disingenuous, for the part of the Opinion which is said to support such statement is plainly the Court of Appeals statement concerning what the Petitioners charged the Respondents with in the Amended Complaint.

This case was tried on Count I of the Amended Complaint which was prepared by plaintiffs subsequent to extensive discovery (A. 1-4). The Amended Complaint alleged that the acts, practices and course of conduct engaged in by the defendants "were intentional and deliberate and wilfully and wantonly committed by the defendants" (A. 82). Thus, it was not the Court of Appeals, the Dis-

trict Court or the defendants who caused these issues to be injected into the case—it was the Petitioners' Amended Complaint which accomplished it. The same theory of the case as set forth in the Amended Complaint was presented to the jury in Petitioners' opening statement (DA 17). Having selected their theory of the case, they must of necessity abide by it.

The question concerning intent is here presented differently than it was in the Court of Appeals—there the question was raised as to whether the jury was properly instructed. The Petitioners there contended, *inter alia*, the jury was confused by the giving of the instruction which is set forth at page 16 of the Petition (defendants' instruction No. 18) and by the *giving* of Petitioners instruction No. 25 which told the jury that "in order for plaintiffs to recover for a violation of the securities laws it is not necessary to prove that defendant had a fraudulent intent." This instruction was given, and the Court of Appeals found that there was no confusion resulting from such action. The Court of Appeals stated:

> "Three of the instructions complained of, numbers 2, 25 and 28 were plaintiffs' own instructions. We do not find that any jury confusion could have resulted from the asserted inconsistency between the plaintiffs' tendered instructions and the defendants' instructions numbered 18, 20 and 30." (Petition, 6a).

In considering this reason of Petitioners for certiorari this Court should be mindful of the fact that Petitioners charged Respondents with a violation of § 12(2) of the Securities Act and presented this claim to the jury. The jury was instructed (by *defendants'* instruction 19) that plaintiffs established a violation, and thus could recover, if it was proved by a preponderance of the evidence that:

> (a) defendants had sold securities to the plaintiffs by means of a communication which contained an un-

true statement of a material fact or an omission to state a material fact, and

(b) plaintiffs had been damaged thereby.

Plainly, the 12(2) claim presented no issue of intent of any type to the jury and presented the easiest road for plaintiffs to hoe—nevertheless, the jury found for the defendants.

In addition to their argument with respect to "intent" in actions under the Acts, which is not viable here because the Court of Appeals made no pronouncement on that subject and because of the disposition by the jury of the 12(2) claim, Petitioners, at page 18, urge as a reason for granting the writ certain evidentiary questions which were decided adversely to them by the following statement of the Court of Appeals:

> "Plaintiffs claim a variety of evidentiary errors were committed by the trial judge. These errors are said to arise from the allowance in evidence of certain testimony adduced by the defendants and the exclusion from evidence of certain matters that the plaintiffs sought to introduce. It would serve no useful purpose to canvass these claims of prejudicial error. We have considered the claims and find them to be without merit." (Petition, 6a).

Such a determination below is hardly the basis for the grant of a writ.

Finally, it is suggested at page 19 of the Petition that the decision below is in conflict with *Globus* v. *Law Research Service, Inc.*, ... F. 2d ..... (2nd Cir., 1969); Fed. Sec. L. Rep. ¶ 92,474 and *Hughes* v. *Securities & Exchange Commission*, 174 F. 2d 969 (D. C. Cir., 1949). There is no such conflict.

In *Globus*, the Court of Appeals held that a managing underwriter was not entitled to indemnity from an issuer

for liability incurred due to false statements in an offering circular filed pursuant to Regulation A under the Securities Act. Reasoning from the absolute liability provisions of Section 11 of that Act (which is in no way involved in the instant case), the Court concluded that to give effect to such an indemnification agreement would promote laxity in investigation by underwriters, which in turn might well be in derogation of the strict liability of underwriters imposed under Section 11 of the Act. The instant case had nothing whatsoever to do with false or misleading statements in registration statements, prospectuses or offering circulars, and therefore cannot be in conflict with the decision in *Globus*. Moreover, the reference in *Globus* to the "trusteeship" of underwriters plainly has reference to the liability of underwriters under Section 11 of the Act, and in any event is dicta.

Further, it is said that *Hughes* v. *Securities and Exchange Commission, supra,* cannot be reconciled with this decision. That is not so. In *Hughes,* the Court affirmed a decision of the S. E. C. which revoked the broker-dealer registration of one Arleen Hughes. The Commission had found that *upon all the facts* Hughes was a fiduciary and therefore was under an obligation to make certain disclosures. The Commission further stated:

> "Our determination that registrant is a fiduciary with respect to her customers and is obligated to make the indicated disclosures [registrant's cost of the securities to be sold as well as the market value of the securities where such price is better than the price at which the securities were offered] does not stem merely from the fact that she renders investment advice, a common practice of over-the-counter firms generally. Our conclusion rests on the fact that registrant has created a relationship of trust and confidence with her clients by holding herself out as performing confidential advisory services for a fee, and has represented that

she would act solely in the best interests of her clients and that she would make only such recommendations as would serve their interests. And, in fact, the record clearly demonstrates that registrant's clients reposed complete trust and confidence in her, as would be expected, since they retained her for the express purpose of advising and counseling them. *We emphasize that it is not intended that the disclosure requirements, which we have found applicable to registrant, be imposed upon broker-dealers who render investment advice as an incident to their broker-dealer activities unless they have by a course of conduct placed themselves in a position of trust and confidence as to their customers.*" Emphasis supplied. *Arleen W. Hughes*, 27 S. E. C. 629, 638-9 (1948).

The *Hughes* case in the Circuit for the District of Columbia merely affirmed this factual determination by the Commission. That is what happened here—the jury found that no fiduciary relationship existed and this was recognized by the Opinion of the Court of Appeals. This determination of the Court of Appeals is wholly supported by Professor Loss who states:

"Unfortunately there is no touchstone for determining when a dealer assumes the obligations of a fiduciary.

* * * * *

"The answer must depend upon all the surrounding circumstances, including the degree of sophistication of the parties and the course of conduct between them." Loss, *Securities Regulation* (2nd ed., 1961) Vol. III pp. 1505; 1507.

III.

The Court of Appeals Has Applied Rule 51 of the Federal Rules of Civil Procedure in Accordance With the Mandate of This Court Laid Down in Palmer v. Hoffman.

In defendants' instruction No. 18, certain elements of wrongdoing are connected by the word "and" and not by the word "or". In the Court of Appeals, plaintiffs referred to this as the "most crucial error" of such instruction (Petition for Rehearing, p. 8).[1]

Rule 51 provides:

> ". . . No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, *stating the matter to which he objects and the grounds of the objection.*" Emphasis supplied. Rule 51, F. R. Civ. P.

In *Palmer* v. *Hoffman*, 318 U. S. 109 (1943), the Supreme Court stated:

> "In fairness to the trial court and to the parties, objections to a charge must be *sufficiently specific to bring into focus the precise nature of the alleged error.*" Emphasis supplied, p. 119.

Plaintiffs quarrel with that portion of the Opinion which reads as follows:

> "The plaintiffs' further contention that their written objections to the instructions contained the error now raised must fall. After leave was granted to file written objections just minutes before the jury was charged, the trial judge gave the plaintiffs an opportunity to elaborate upon the written objections. With reference to instruction number 18, plaintiffs' counsel

1. Here, apparently there has been a change of position by Petitioners, for Reason No. 2 supplied for the grant of the writ focuses on the aspect of intention.

merely stated that it was 'repetitious.' This was inadequate notice of the objection." (Petition, 6a).

The record amply supports this portion of the Opinion. On three occasions, plaintiffs were given the opportunity to, and did, address themselves to this instruction (A. 1300-2, 1303-5, 1359); yet, never did they point out what they described in the Court of Appeals as the "most crucial error." Plainly, the record demonstrates that no objection was stated to the court in a sufficiently specific manner so as "to bring into focus the precise nature of the alleged error". *Cf. Palmer* v. *Hoffman*, 318 U. S. 109, 119 (1943).

Petitioner's reliance on the voluminous written objections filed with the District Court can only be described as "lying in the weeds." They were obviously aware that "and" shoud be "or", but they elected to bury this objection solely for use on appeal in the event of an adverse verdict. This type of conduct is what Rule 51 is designed to prevent. *Stilwell* v. *Hertz Drivurself Stations, Inc.*, 174 F. 2d 714 (3rd Cir., 1949).

In addition, in response to this point of the Petition, we adopt our argument with respect to Instruction No. 18, particularly that part which deals with the lack of prejudice to plaintiffs, which appears at pages 30 through 31 of this response.

The "tempest in a teapot" about this instruction is not a reason for the grant of a writ.

CONCLUSION.

In this factually complicated lawsuit, there was substantial evidence to support the jury verdict in favor of the respondents-defendants, and that was recognized by the Court of Appeals (Petition, 7a-8a). The reasons propounded for the grant of the writ were rejected by the Court of Appeals in its Opinion and in its order denying the Petition for Rehearing En Banc.

Neither justice nor the considerations embodied in Rule 19 of this Court require the grant of a writ.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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